the state", for few corporations would remain outside of the jurisdiction because of this stringency. But were similar interpretation to be given to taxing statutes, it might well operate to effectuate a wholesale exclusion. Few corporations will carry on even their financial business within the state, if by so doing they subject themselves to local taxation. Another angle from which this problem may be approached is that of ordinary justice. It is manifestly equitable to subject a foreign corporation to service of summons more readily than to taxation. Once more no court has definitely enunciated these criteria.

For those who expected a well-defined test wherewith to decide each of these problems, this investigation is probably a disappointment.[26] Yet even the courts have admitted that each case must be decided on its individual merits. They are moved only by general principles of policy and have thus far evolved no convenient yard-stick for the practitioner. There must, however, be some value in the knowledge that an examination of the cases discloses no such criteria.[27]

STATUTES OF LIMITATIONS IN THE CONFLICT OF LAWS.—"Statutes of Limitation relate to the remedy and not to the contract . . . all suits must be brought within the period prescribed by the local law of the country where the suit is brought,—the lex fori."[1] It is believed that the inconsistencies resulting from the application of this frequently heard formula, justify an analysis of its basis. An example of its vitality in our law is the recent case of *Fisher* v. *Burk* (Miss. 1920) 86 So. 300. Suit was on a contract made in Illinois between the plaintiff and the defendant, both residents of that state. The contract was for the exchange of certain Illinois land for Mississippi land, with a stipulation for a reconveyance upon a contingency. The plaintiff sought to charge the Mississippi land with damages for breach of the agreement to reconvey. One defense was the Mississippi statute of limitations, and on this ground judgment was for the defendant.

Now it is interesting to note that, except in cases of so-called personal obligations *ex contractu*, a different principle is evoked. Where land or movables have been possessed adversely, the running of the statute is said to affect the right, and "give a positive title."[2] And in questions of title to movables, a foreign statute of limitations may be set up, and the forum disregards its own.[3]

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[26] In *Manila Electric, etc. Co.* v. *Knapp*, the court reiterated the suggestion in *Hovey* v. *De Long Hook & Eye Co.* that the business done be of a sort which might fairly be termed privileged and "which necessitated or sought governmental opportunity and protection to be compensated or balanced by contributions through taxation to the burden of government". But the unsatisfactory character of this rule is immediately apparent. It leaves it with the courts to do just what they have been doing: to decide each case upon its facts and then fit the facts to the rule or not as seems fitting.

[27] No attempt has been made to investigate the manner in which other states have dealt with this problem. A rather complete collection of the cases is to be found in a pamphlet published (1920) by the Corporation Trust Co. of New York entitled "What Constitutes 'Doing Business'".

[1] *Townsend* v. *Jemison* (1850) 9 How. 407, 413, 415; *Miller et al.* v. *Brenham* (1877) 68 N. Y. 83; see *The British Linen Co.* v. *Drummond* (1830) 10 B. & C. 903; Angell, *Limitations* (6th ed. 1876) c. viii.

[2] Per Lord Mansfield in *Taylor* v. *Horde* (1757) 1 Burr. 60, 119 (land); *Toltec Ranch Co.* v. *Cook* (1903) 191 U. S. 532, 24 Sup. Ct. 166 (land); *Sprecker* v. *Wakeley et al.* (1860) 11 Wis. 432 (land); *Shelby* v. *Guy* (1826) 11 Wheat. 361 (slave); *Fears Adm'r* v. *Sykes* (1858) 35 Miss. 633 (slave); see Minor, *Conflict of Laws* (1901) 523; (1889) 3 Harvard Law Rev. 318-321.

[3] *Shelby* v. *Guy, supra,* footnote 2; *Fears Adm'r.* v. *Sykes, supra,* footnote 2. *A fortiori* this rule would seem applicable to land. The apparent dearth of authority may be due to the general view that actions involving the right to possession of land are not transitory. Hence, in such cases the *lex fori* will usually be the *lex situs.*

It is also interesting to note that in the contract cases, the courts shrink from carrying to its logical extent their doctrine of the statute "going only to the remedy." For although such a statute may be modified before it has run,[4] legislation may not afterward destroy the effect of the bar.[5] The characteristics of "going only to the remedy" (not affecting the obligation), and at the same time conferring a defense which is protected as a so-called vested right (properly an immunity), are conceptually difficult of reconcilement. Again, the statute "goes only to the remedy", yet before the time has run, the statute cannot be modified by shortening the period, so as to take away at once all remedy, or "directly impair the obligation."[6] A reasonable time must be given to bring suit.[7] The latter rule and its corollary may be unassailable from the point of view of social expediency. But they hardly support the formula which is under analysis. It is said that statutes of limitation are not to be regarded as impairing the obligation of contracts.[8] Phrased more realistically, the statement would be that such statutes, in general, are a socially necessary impairment of the obligation of contracts. Factually, whatever interferes with the enforcement of a claim impairs the obligation.[9]

Although the typical statute of limitations "goes only to the remedy", and therefore the *lex fori* governs, yet where the statute *loci contractus* is expressly worded as extinguishing the claim, then the forum disregards its own statute and allows no action if the period according to the *lex loci contractus* has elapsed.[10] Moreover, when a statutory liability is created, and the same statute limits a period for bringing suit, the foreign forum will entertain no action to enforce liability under that statute unless brought within the specially limited period.[11] The same is true, it seems, though the special period be designated in a statute other than and subsequent to the one creating the liability.[12] The conventional explanation of the cases involving special statutory periods, which apparently furnish an exception to the general rule, is the *a priori* statement that a statutory period must be taken as a condition of the statutory liability. But the courts do not attempt

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[4] *Pritchard* v. *Spencer* (1851) 2 Ind. 486; *Holcombe* v. *Tracy* (1858) 2 Minn. 241; see *Ross et al.* v. *Duval et al.* (1839) 13 Pet. 45.

[5] *Davis* v. *Minor* (Miss. 1835) 1 How. 183; *Rockport* v. *Walden* (1873) 54 N. H. 167; *Thompson* v. *Rand* (1875) 41 Iowa 48; *McCracken County* v. *Mercantile Trust Co.* (1886) 84 Ky. 344; *Fish* v. *Farwell* (1896) 160 Ill. 236, 43 N. E. 367; *contra, Campbell* v. *Holt* (1885) 115 U. S. 620, 6 Sup. Ct. 209 (two dissenting). This case is believed to stand alone. See (1889) 3 Harvard Law Rev. 319, n. 5.

[6] *Pereless* v. *City of Watertown* (D. C. 1874) 6 Biss. 79, 84. See *Call* v. *Hagger* (1812) 8 Mass. 423; *Berry & Johnson* v. *Ransdall* (Ky. 1863) 4 Metc. 292; *Parmenter* v. *State* (1892) 135 N. Y. 154, 31 N. E. 1035; *Terry* v. *Anderson* (1877) 95 U. S. 628; *Christmas* v. *Russell* (1866) 5 Wall. 290, per Mr. Justice Clifford: "Cases, however, may arise where the provisions of the statute on that subject may be so stringent and unreasonable as to amount to a denial of the right, and in that event a different rule would prevail, as it could no longer be said that the remedy only was affected by the new legislation."

[7] See *Berry & Johnson* v. *Ransdall, supra,* footnote 6; *Christmas* v. *Russell, supra,* footnote 6.

[8] See *Call* v. *Hagger, supra,* footnote 6.

[9] See *McCracken* v. *Hayward* (1844) 2 How. 608, 612. The language of Mr. Justice Baldwin is significant: "If any subsequent law affect to diminish the duty, or impair the right, it necessarily bears on the obligation of the contract, in favour of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy is directly obnoxious to the prohibition of the Constitution."

[10] *Brown* v. *Parker* (1871) 28 Wis. 21; *Baker* v. *Stonebraker's Adm'rs.* (1865) 36 Mo. 338; see *Huber* v. *Steiner* (1835) 2 Bing. N. Cas. 501.

[11] *Negaubauer* v. *Great Northern Ry.* (1904) 92 Minn. 184, 99 N. W. 620; *The Harrisburg* (1886) 119 U. S. 199, 7 Sup. Ct. 140.

[12] *Davis* v. *Mills* (1904) 194 U. S. 451, 24 Sup. Ct. 692.

to differentiate on principle these cases from those where limitation is by a general statute, and where the *lex fori* is held to apply.[13]

The presence in our law of the *lex fori* doctrine which has just been considered in some of its ramifications, is explicable only by recourse to its probable origin,—the well known rule that a recovery can be had against a debtor who, after the claim has become unenforcible through lapse of time, promises to pay it. This rule has been developed along two different lines. One theory requires declaration upon the new promise as the cause of action, with the barred debt as the consideration.[14] Other courts regard the old debt as the cause of action and compel pleading of the new promise by way of replication to a defense of the statute.[15] The new promise is then treated as a waiver of that defense.

But it would seem, delving beneath the language of the opinions, and considering the substance rather than the form of the pleadings, that neither theory satisfies analysis. In both groups of cases, the facts upon which a plaintiff's recovery is predicated, are the same, *viz.*, an old debt and a new promise. Both elements must eventually be proved by a plaintiff in a properly pleaded action. Realistically, therefore, neither the new promise nor the old debt constitutes the cause of action. The basis for recovery is a new combination of operative facts. If either constituent be absent—new promise or old debt—there is no recovery. According to this analysis, the running of the statute does extinguish the old cause of action. The plaintiff is no longer privileged to bring suit,[16] nor has he, by setting in motion the machinery of the courts, a legal power to subject the defendant to a duty to pay damages. From the point of view of the defendant, after the statute has run, there is no legal duty to perform. But the latter has the legal power, by making a new promise, to place himself under a new duty, and so to confer upon the plaintiff a new correlative right. This legal relationship, it is submitted, is a new one, being the legal consequences attached to and dependent upon a new state of facts. This analysis, if sound, refutes the doctrine that the statute "goes only to the remedy". Thus is destroyed the only basis given for applying the *lex fori* in such cases.

It is not surprising that such a misapplication has been made of the antecedent debt rule, as its eccentric career indicates neither adequate analysis nor satisfactory understanding by the courts. For example, there is respectable authority holding that a judgment debt, barred by the statute, plus a new promise to pay, may be the basis of an action.[17] But there is equally respectable authority to the contrary.[18] According to some, but not all courts, a new promise after the bar, though made a stranger, will work a revival.[19] Although the revival doctrine has been extended to promises to pay barred contractual claims of a definite class without reference to any specific claims,[20] yet it seems

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[13] See *Negaubauer* v. *Great Northern Ry., supra,* footnote 11; *The Harrisburg, supra,* footnote 11; *Pulsifer* v. *Greene* (1902) 96 Me. 438, 448, 52 Atl. 921.

[14] *Bell* v. *Morrison et al.* (1828) 1 Pet. 351; *Erskine* v. *Wilson* (1857) 20 Tex. 77; (*semble,*) *Tanner* v. *Smart* (1827) 6 B. & C. 603; see *Smith* v. *Caldwell* (S. C. 1868) 15 Rich. L. 365.

[15] *Lord* v. *Shaler* (1819) 3 Conn. 131; *Varner* v. *Varner* (1873) 69 Ill. 445; *Stewart* v. *Garrett & Maus* (1886) 65 Med. 392, 5 Atl. 324; *Ilsley* v. *Jewett* (Mass. 1841) 3 Metc. 439.

[16] (1915 15 COLUMBIA LAW REV. 45; (1913) 23 Yale Law Journal 16.

[17] *Carshore* v. *Huyck* (N. Y. 1849) 6 Barb. 583; *Stevens* v. *Hewitt* (1858) 30 Vt. 262; *Spilde* v. *Johnson* (1906) 132 Iowa 484, 109 N. W. 1023

[18] *Burkson Bros.* v. *Cox* (1895) 73 Miss. 339, 18 So. 934; *Ludwig* v. *Huck* (1892) 45 Ill. App. 651; see *Olson* v. *Dahl* (1906) 99 Minn. 433, 109 N. W. 1001; *Garabedian* v. *Avedisian* (R. I. 1919) 105 Atl. 516.

[19] *St. John* v. *Garrow* (Ala. 1836) 4 Porter 223; *Stewart* v. *Garrett & Maus, supra,* footnote 15; *contra, Bahny* v. *Levy* (1912) 236 Pa. St. 348, 84 Atl. 835.

[20] *Belcher* v. *Tacoma Eastern R. R.* (1917) 99 Wash. 34, 168 Pac. 782; *Big*

that no action lies when a new promise has been made to pay a barred claim *ex contractu* that is unliquidated.[21] *A fortiori* there is no resurrection of barred unliquidated tort claims.[22]

Pragmatically and theoretically, the *lex fori* formula cannot be a legitimate offspring of the antecedent debt rule. With the Anglo-American doctrine as to *lex fori* in these cases may be compared the prevailingly opposing view of continental jurisprudence.[23] And as a matter of expediency much can be said in favor of applying a single system of rules to all phases of the validity of an obligation. It is, perhaps, with this end in view, that the *lex fori* doctrine has been somewhat weakened in many states by legislation to the general effect that actions *ex contractu* barred by the *lex loci contractus* are deemed barred by the forum.[24] But the vitality of the doctrine is so great in the cases, that further legislation alone can be looked to for the death blow.

STATUTORY DISCRIMINATION AGAINST NON-RESIDENTS OF A STATE.—The recent case of *Quong Ham Wah Co.* v. *Industrial Accident Commission of California*[1] raises in a rather unusual way the familiar problems of the interest of a plaintiff required in order to attack the constitutionality of a discriminatory statute, and the effect of Article IV, Section 2[2] of the federal Constitution upon a state statute which bestows benefits upon its own citizens and is silent as to citizens of other states. Section 58 of the California Workmen's Compensation Act[3] provides that the Commission have jurisdiction over controversies issuing from injuries occurring outside the state, where the employee is a *resident of California* and the employment contract is made in the state. In the instant case the injured employee was a resident of California, and the employer sought to escape liability on the ground of the invalidity of the statute in that it denied compensation to citizens of other states. The main opinion[4] upheld the power of the employer to attack the constitutionality of the statute, even though he was not one of the class discriminated against. The court argued that here was a case where one of this class (*i. e.* a citizen of another state) could not possibly have a standing before the Commission, since the Compensation Act gave it no jurisdiction over such a case, and thus he was prohibited from attacking the legislation; therefore, the employer was properly before the court. A determination of the validity of the statute affected his rights. But then the main opinion went on to hold that the effect of construing as invalid the state's attempt to restrict the benefits of the compensation provisions to its own citizens was not to annul the enactment, but simply to extend the benefits to citizens of other states, and so the employer was liable anyhow.

One may seriously question why the court went to the length it did in upholding the power of the employer to attack the constitutionality of the statute

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Diamond Drilling Co. v. *Chicago, M. & St. P. Ry.* (1919) 142 Minn. 181, 171 N. W. 799.

[21] *Semble, Quarrier's Adm'r.* v. *Quarrier's Heirs* (1892) 36 W. Va. 310, 15 S. E. 154; *White* v. *Pittsburgh Vein Coal Co.* (1920) 266 Pa. St. 145, 109 Atl. 873.

[22] *Peterson* v. *Breitag* (1893) 88 Iowa 418, 55 N. W. 86; *Nelson* v. *Petterson* (1907) 229 Ill. 240, 82 N. E. 229.

[23] See Savigny, *Conflict of Laws* (Guthrie's 2nd ed. 1880) 249, 267 *et seq.;* (1918) 28 Yale Law Journal 492.

[24] See notes to 48 L. R. A. 639; 4 L. R. A. (N. S.) 1029; 51 L. R. A. (N. S.) 96; L. R. A. 1915 C. 976.

[1] (Cal. 1920) 192 Pac. 1021.

[2] "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

[3] Cal. Stat. 1917, p. 870.

[4] Per Lennon, J. There were four separate concurring opinions written.